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IN THE

Supreme Court of the United States

October Term, 1963
No. 645

Case No. 17235

PENSICK & GORDON, INC., *Petitioner,*

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*, *Respondent.*

Case No. 17380

PENSICK & GORDON, INC., a California corporation, *Petitioner,*

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Opinions Below.

The opinion of District Judge Byrne dismissing the complaint in No. 17235[1] for lack of jurisdiction is unreported but appears in the printed transcript of the record of the appeal in said cause [1 Tr. 94].[2] Judge Byrne rendered no opinion in support of his order dismissing the first amended complaint (the second cause); the court's order in this respect appears in the printed transcript of record of the second appeal [2 Tr. 194]; the transcript of the oral argument which preceded this order, however, does give some indication of the court's thinking in this respect [2 Tr. 210-279, at pp. 248-254, 258-261, 264-266, 275-279].

The first opinion of the Court of Appeals in these causes is reported in 302 F. 2d, at 391 (April 1962), and is attached hereto as Appendix "A".

Following, this court granted certiorari in the causes, vacated the judgment and remanded for further consideration in the light of its opinion in *Hewitt-Robins v. Eastern Freight-Ways, Inc.* [(1962) 371 U. S. 84], (1962) 371 U. S. 184, 9 L. Ed. 2d 227. This opinion is attached hereto as Appendix "B".

This court's opinion in *Hewitt-Robins, supra,* is attached hereto as Appendix "C".

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[1]Where necessary to distinguish for clarity, the cause and appeal in No. 17235 will be referred to as the "First Cause" and "First Appeal" and those in No. 17380 will be referred to as the "Second Cause" and "Second Appeal," respectively.

[2]Page references to the printed transcript of record in the "First Appeal" will be preceded by the designation "1 Tr."; that in the "Second Appeal," "2 Tr." These printed transcripts have been forwarded by the Clerk of the Court of Appeals in accordance with Rule 21(4).

The decision of the Court of Appeals on remand is as yet unreported, but is printed and attached hereto as Appendix "D".

Grounds for Jurisdiction.

The District Court, pursuant to appropriate motions, dismissed the complaint in the first cause [1 Tr. 94] and the first amended complaint in the second cause [2 Tr. 194] for want of jurisdiction in each instance; The Court of Appeals, in its first opinion, affirmed these orders. This latter judgment was subsequently vacated by this court and the causes remanded for further consideration. The original orders of the District Court are affirmed in part and reversed in part by the opinion and judgment of the Court of Appeals on remand. Review of the latter judgment by this court is, accordingly, sought under 28 U. S. C. A., §1254(1).

The judgment of the Court of Appeals on remand is dated 18 September, 1963 and was filed and entered the same date; no rehearing was sought or granted, nor has any order been sought by or granted to this petitioner for an extension of time within which to petition for certiorari.

Questions Presented.

As pointed out in the first petition herein, these causes ultimately involve two questions of major importance to the transportation industry and those sectors of the business community which depend upon service from interstate motor common carriers: first, are federally certificated motor common carriers immune to damage suits by shippers? second, if shippers do, in fact, still retain private rights of action against

such carriers for breach of the duty to serve, are those rights barred or affected by the existence of a peaceful picket line at the shipper's place of business?

The Court of Appeals on remand held that the right of action for breach of the common law duty to render service survived the passage of the Motor Carrier Act (Interstate Commerce Act, Part II) and was thus preserved to shippers, but that no statutory right of action arises through breach of the same duty as enunciated in Sections 216(b) and (d) of the Motor Carrier Act. [49 U. S. C. A. §316 (b) and (d)]. Accordingly, the court concluded, the Federal Courts have jurisdiction of a shipper's common law cause of action for damages in a diversity situation and this jurisdiction is not pre-empted or barred because the breach of duty was occasioned by a picket line at the shipper's place of business; absent such diversity, on the other hand, there is no other basis for jurisdiction.

This decision resolved the general questions set forth above in part only and left other aspects thereof still in need of final determination.

The immediate questions specifically presented, therefore, are the following:

(1) Does a private shipper have the right to seek and obtain redress from motor common carriers for loss or damage suffered as a consequence of the carriers' breach of the duty to render service under the statutory sanctions of the Motor Carrier Act, Sections 216(b) and (d)?

(2) Assuming the existence of such a shipper's right of action, do the Federal Courts have jurisdiction thereof as an action arising under an Act of Congress regulating commerce?

(3) Conversely stated, the foregoing questions may be summarized as follows: Did Congress intend by the Motor Carrier Act that no rights should flow to shippers from the statutory duty to render service imposed by it upon motor common carriers and, at the same time, intend that shippers should continue to enjoy the rights flowing from the common law counterpart of that same duty?

(4) In view of the important Federal policy and statutory considerations attaching to and arising from such common law damage actions, as indicated in the court's opinion on remand, do not the Federal Courts have jurisdiction thereof under 28 U. S. C. A., Sec. 1331, independent of the existence of diversity of citizenship?

(5) If the Federal Courts' jurisdiction to hear and determine such a cause is not barred or preempted because of the fact that the breach of duty was occasioned in part by the existence of a peaceful picket line at the shipper's place of business, is such jurisdiction or the cause of action otherwise affected or modified as a consequence of this fact?

Statutes Involved.

Interstate Commerce Act, Part II (Motor Carrier Act) Section 216(b), (d) and (j) [49 U. S. C. A., Sec. 316(b), (d) and (j)].

"§316. RATES, FARES AND CHARGES—

. . .

"RATES, FACILITIES FOR CARRIERS OF PROPERTY

"(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transporation of property in interstate or foreign commerce.

. . .

"UNDUE PREFERENCES OR PREJUDICES PROHIBITED

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be

unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description:

. . .

"EFFECT ON REMEDY OR RIGHT OF ACTION

"(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. Feb. 4, 1887, c. 104, Part II, §216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, §16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, §22(b-d), 54 Stat. 924."

Statement of the Case.

This is an action brought by a shipper against several ICC-certificated motor common carriers seeking money damages for losses suffered as a consequence of the refusal of the carriers to provide service, in breach of their duty to do so. Petitioner in its complaint in the first cause alleged the breach by each of the respondent carriers (defendants and appellees below) of

their common law and statutory duties to serve petitioner [1 Tr. 4-26].

The breach lay in the failure of the carriers to make pick-ups and deliveries of goods at petitioner's place of business, in response to reasonable requests on the part of petitioner [1 Tr. 6-7].

In the original complaint, petitioner asserted jurisdiction under 28 U. S. C. A., Section 1332, diversity of citizenship, and under Section 1337 on the theory that contained among the various duties enunciated by Sections 216(b) and (d) of the Motor Carrier Act was a restatement of the common law duty to provide service and to serve without unjust preference or discrimination; that this statutory sanction gives rise to a right on the part of shippers to receive such service and thus a right of action for damages occasioned by its breach, and that the cause, therefore, arose under an Act of Congress regulating commerce [1 Tr. 4].

Pursuant to appropriate motions to dismiss, the District Court, relying on *Consolidated Freightways v. United Truck Lines* (9th Cir. 1954), 216 F. 2d 543, decided that it did not have jurisdiction to hear and determine the controversy because ". . . the Motor Carrier Act does not provide *any* private remedy for a violation of *any* of its provisions" (Emphasis added) [1 Tr. 94].

The appeal in the first cause was taken from this decision, naming, as appellees, those defendants as against whom diversity of citizenship could not be shown [1 Tr. 95].[3]

[3]The original complaint was prepared and filed against a large number of defendants under circumstances of urgency, and it was not possible in the time at hand to ascertain the facts re-

Respondent then filed a first amended complaint (the second cause), bringing in certain additional carrier defendants and renaming those defendants to the original complaint which were not made appellees in the first appeal [2 Tr. 2-2h]; as to all of these, diversity of citizenship was this time alleged both generally *and* specifically [2 Tr. 2a-2d]. Petitioner again asserted jurisdiction on the basis of 28 U. S. C. A., Sections 1332 and 1337, but this time placed equal reliance upon petitioner's common law right of action against a common carrier for breach of the duty to render service, on the theory that this right survived the passage of and existed apart from the Motor Carrier Act [2 Tr. 2a-2b].

Answers, as well as affidavits of various parties, asserted in both causes that the failure or refusal of service was due to the existence of a peaceful picket line at petitioner's place of business [2 Tr. 13, 20, 27, 34, 41, 119, 127-128, 135, 143, 150-151; 46, 78-81, 84-89, 90; 1 Tr. 78-93; 302 F. 2d at p. 393].

Pursuant to motions timely brought, the District Court again dismissed, without opinion, for want of jurisdiction over the matter [2 Tr. 192]. From this decision, the second appeal (in 17380) was taken.

Petitioner's basic contentions are, as stated in the opinion of the Court of Appeals, that it, as a shipper, invoked the duty of a common carrier to serve and to render service without unjust preference or discrimina-

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garding the citizenship of all of the various defendants; it contained, therefore, only general allegations of diversity and no factual specifications. As a consequence, the court, on the motion to dismiss, did not reach the question of whether there existed a common law basis of action apart from statutory consideration."

tion; that the shipper's historic right of action at common law to recover damages in the courts for breach of that duty is in no way inconsistent with any power or exclusivity conferred upon the Interstate Commerce Commission (hereinafter referred to simply as "Commission") under the Motor Carrier Act; that the shipper's cause of action therefore continues in dual form both as a common law right under the savings clause of the Act (Sec. 216(j); 49 U. S. C. A., Sec. 316(j)), as well as under the statutory sanctions of Sections 216(b) and (d) (49 U. S. C. A., Sec. 316(b) and (d)); and that the Federal Courts have jurisdiction over such actions (302 F. 2d 391, 393).

The Court of Appeals, in its original opinion, struck down both of these contentions holding that no matter what the basis asserted, the courts are closed to shippers aggrieved by unreasonable disservice or unjust discrimination on the part of motor common carriers for the reason that "whenever under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice or unjustness of such discriminations, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the court" (302 F. 2d at p. 394).

A further contention raised in opposition to the position of petitioner below, but not reached by the Court of Appeals because of the particular ground of the holding, was that the District Court was without jurisdiction because the controversy between the parties raised issues within the exclusive primary jurisdiction

of the National Labor Relations Board (hereinafter referred to simply as "Board") (302 F. 2d at p. 394).

This court granted certiorari upon the petition of this petitioner, vacated the judgment of the Court of Appeals and remanded for further consideration in the light of *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.* [(1962), 371 U. S. 84], 371 U. S. 184 (1962).

Accordingly, the causes were re-briefed and reargued before the Court of Appeals which, on 18 September, 1963, issued its opinion, holding:

(1) That petitioner did indeed have a common law cause of action for damages in the premises which survived the passage of the Motor Carrier Act;

(2) But that petitioner had no statutory rights, and therefore no right of action by virtue of the duty of service enunciated in Sections 216(b) and (d) of the Motor Carrier Act;

(3) That the Federal District Court had jurisdiction to hear and determine a common law cause of action on the basis of diversity only;

(4) That this jurisdiction was not vacated or preempted to the Board by the fact that the breach of duty was occasioned in part by the presence of a peaceful picket line at plaintiff's place of business;

(5) That the District Court, in further proceedings must determine to what extent, if any, petitioner's common law right has been "affected or qualified or supplemented" by the Motor Car-

rier Act or the Labor Management Relations Act; and

(6) That in this connection a District Court could require reference to either the Commission or the Board for such aid as might be necessary to the court's ultimate decision.

Argument for Allowance of Writ.

Two general questions of major importance to the transportation industry and those sections of the business community dependent upon it were originally presented by the within causes for resolution, at least in substantial part if not entirely, by the ultimate decision herein.

The first is the question of what, if any, shipper's damage actions against motor common carriers survived the passage of the Federal Motor Carrier Act. The specific point here involved is the shipper's right to recover damages for a breach of the duty to provide service. The second major question has to do with the extent to which such a right, assuming its existence, is affected by the existence of a peaceful picket line at the shipper's place of business as giving rise, at least in part, to the claimed breach of duty.

The paramount importance of these questions, the necessity for their resolution and the consequentially necessary resolution of a possible conflict between the national transportation policy and the national labor policy all signal the need for determination of these causes at this level.

We believe that this court itself indicated its recognition of the importance of these questions by its granting of the earlier petition for certiorari herein.

As a consequence of this court's judgment, the Court of Appeals, on remand, has resolved these questions in part, but in a manner which leaves the situation clouded with uncertainty and fraught with anomaly.

The Court of Appeals now holds that a shipper does have a common law cause of action preserved to it for damages for breach of a carrier's duty to provide service and that the Federal Courts have jurisdiction of such causes where diversity exists; however, in an area where Congress and the courts have stressed the primacy of harmony and consistency between the common law and the statutes erecting a scheme of Federal regulation, the court's opinion creates a major inconsistency and disharmony by holding that the Federal statutory counterpart of the common law duty to provide service does not form the basis for any shipper's remedy and cannot, therefore, provide a statutory basis for jurisdiction.

Thus, the court has declared, in effect, that the statutory duty is inconsistent with the common law duty, that it creates a right without a remedy and that the Federal Courts have no jurisdiction over those very causes which involve and require the interpretation of a Federal statute!

This holding patently requires clarification and in itself argues for issuance of the writ in this cause. However, with specific reference to the criteria enunciated by Rule 19, we discuss the matter further below.

(1) The Decision of the Court of Appeals on Remand Conflicts With Decisions of Courts of Appeals in Different Circuits as Well as With Decisions of Federal District Courts in Other Circuits on the Same Matter.

The Court of Appeals has held that the Motor Carrier Act created no statutory basis of action for breach of the duty to provide service, cognizable in the Federal Courts in the first instance and that there existed, therefore, no jurisdiction in the Court below of the causes of action against those defendants as to whom diversity could not be shown (Opin. on remand, p. 2).

The Court reaches this conclusion by interpreting the holding of this court in *Hewitt-Robins* as extending only to the survival of the common law right there involved.

We believe, as we argue below, that the opinion contravenes the actual teaching of *Hewitt-Robins*. In addition, however, it creates a direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Meier & Pohlman Furniture Co. v. Gibbons* (1956), 233 F. 2d 296 (cert. den. 352 U. S. 879). In that case jurisdiction was held to extend to the entire complaint, specifically including those causes of action based upon the same breach of statutory duty as here asserted.

The Court of Appeals decision herein is likewise in conflict with a Federal District Court case which reached the same conclusion as the Court of Appeals in *Meier & Pohlman, supra: Merchandise Warehouse Company v. ABC Freight Forwarding Corp.* (1958, S. D. Ind.—7th Cir.), 165 Fed. Supp. 67.

(2) The Opinion of the Court of Appeals on Remand Constitutes a Misapplication of Decisions of This Court.

We further submit that the Court of Appeals, in upholding a common law right of action but denying the statutory right and therefore any independent basis for jurisdiction in the Federal Courts, has misapplied the teaching of the pertinent decisions of this court. In *T.I.M.E., Inc. v. United States* (1959), 159 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904, originally felt by the Court of Appeals herein to control, both statutory and common law bases of action were asserted by the government and, because of considerations impinging upon the exclusivity of the Commission's rate making powers, these were held not to exist.

Petitioner has argued from the outset that the rule in *T.I.M.E. v. United States* was inapposite.

T.I.M.E. v. United States, supra, was advanced by the defendant as controlling in *Hewitt-Robins v. Eastern Freight-Ways, supra,* and was upheld in this contention by the lower courts. The plaintiff in that action, who also asserted common law and statutory bases of action (the latter grounded in the identical statutory sections herein relied on by plaintiff) also vigorously denied the applicability of *T.I.M.E. v. United States, supra,* to its cause. 187 F. Supp. 722, 723; 293 F. 2d 205, 206.

The parallel between the instant cause and *Hewitt-Robins* is an obvious one, and this court so recognized when it granted certiorari, vacated and remanded with the direction that the cause be reconsidered in the light of that decision.

The primary significance, we take it, of this court's holding in *Hewitt-Robins* was its conclusion, that *T.I.M.E. v. United States, supra*, did *not* control and was *not* appropriate to the situation there presented; we further take it that the decision in this cause carried with it the same unmistakable implication.

While the bulk of this court's opinion in *Hewitt-Robins* is addressed to a discussion of the survival of the common law basis of action, it seems apparent that the reason for this starting point is that the key to the situation lies in the consistency of such a right of action with the statutory scheme embodied within the Motor Carrier Act. The two must be in harmony and consistent one with the other or the common law cause of action, by definition, could not survive. Motor Carrier Act, Section 216(j) [49 U. S. C. A. §316(j)]; 371 U. S. 89.

The Court of Appeals, consonant with *Hewitt-Robins*, held that the common law duty to provide service created a right in shippers to receive such service and that a cause of action accrued to shippers who were damaged by a Carrier's breach of this duty. To hold otherwise would be to affirm the existence of a right, but to render it meaningless by denying any remedy for its vindication.

This same consequence we submit must follow from the statutory enunciation of the common law duty to provide service as embodied in Sections 216(b) and (d) [49 U. S. C. A. §316(b) and (d)]. That is to say, the statutory duties thus imposed upon carriers must, at the same time, give rise to a right in shippers to receive such service, as well as a remedy for the assertion and vindication of that right when the duty is

breached. To hold otherwise, would violate the symmetry of the statutory and common law scheme, would create an inconsistency between the statutory and the common law duty and right, one which would, by the terms of the savings clause, require the extinction of the common law remedy.

Manifestly, therefore, the considerations applicable to the statutory *as well as* the common law rights of action asserted in *T.I.M.E. v. United States, supra,* must both be held inapplicable and inapposite here, and we believe this court so intended, for no other result can flow from the conclusion that the common law remedy here, and in *Hewitt-Robins;* survived.

The Court of Appeals has here held otherwise and has thus created an anomaly between the Motor Carrier Act and the common law and, in effect, stultified the whole theory and basis of this court's conclusion in *Hewitt-Robins* upholding the common law basis of action.

(3) The Opinion of the Court of Appeals on Remand Has Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

From what we have said before, it will be apparent that these causes present a number of important questions of Federal law which have not been, but should be, decided by this court.

The most important of these, in the present posture of the matter, is the resolution of the inconsistency between statutory and common law bases of action created by the Court of Appeals opinion on remand. We strongly believe that this result was not intended by

this court and that it represents a misinterpretation of the teaching of *Hewitt-Robins*.

If we assume, for the sake of argument, however, that this court's opinion in *Hewitt-Robins* intended to reach no further than a holding as to the existence of a common law basis of action, then the result reached below by the Court of Appeals on remand of itself emphasizes the importance of the questions still left undecided, as well as the necessity for their resolution.

A few of th ramifications of the holding on remand illustrate this.

Under this decision, a Federal Court could entertain only common law actions for damage in situations where diversity existed. The State court would then be the only forum open to non-diversity parties. However, the court has indicated that such actions abound with implications impinging upon the national transportation policy and the national labor policy, involving interpretations and possibly applications of the Motor Carrier Act as well as the Labor Management Relations Act, and the court further indicates that conflicts between these statutes and these policies will undoubtedly have to be resolved at the trial court level in the process of determining and adjudicating the rights of the parties (Opin. on remand, p. 4).

It seems somewhat anomalous to say that in non-diversity cases, a Federal Court is excluded from jurisdiction to determine such important questions of Federal law and policy on the one hand, and that a State Court must address itself to this task. Such a result, moreover, would hardly be conducive to the stability and uniformity of Federal carrier policy and practice which

was one of the principal objects sought to be achieved by the Motor Carrier Act. *T.I.M.E. v. United States, supra,* 359 U. S. at p. 475, n. 14; see also *Hewitt-Robins v. Eastern Freightways,* 371 U. S. at p. 89.

The Court below further indicates that the Trial Court may well have to strike a balance between what it terms the "conflicting impacts of apparently conflicting Federal statutes upon these common law rights." (Opin. on remand, p. 4). This seems to us to be only emphasizing the pertinency of the basis for jurisdiction petitioner has consistently urged—namely the existence of important rights and questions arising under Federal laws regulating commerce. Again it seems to us singularly inappropriate to require that this balance be struck by a State Court in one case and by a Federal Court in the other.

The Court below additionally indicates that it may also be necessary for the Trial Court to refer or require reference to the Commission *or the Board* . . . for such aid as may be necessary or useful to that Court's ultimate decision." (Opin. on remand, p. 3). This procedure itself has no statutory sanction, but is as noted by this court in *T.I.M.E. v. United States, supra,* as well as in *Hewitt-Robins, supra,* a practice which has grown up in the determination of certain matters involving the Interstate Commerce Act. However, we are unaware of any instance in which it has been suggested that a State Court might be required to refer to a Federal agency some aspect of a matter properly before it, as a condition precedent to fulfilling the exercise of its own jurisdiction. Again, the mere statement simply emphasizes the pertinency of Federal law as well as procedure to actions involving federally certi-

ficated motor carriers, and the appropriateness of Federal Court jurisdiction over such actions in every instance not simply because of the chance circumstance of diversity, but because of the overriding pertinency and essentiality of such actions of Federal law, policy and practice.

In other words, while denying the statutory right of action and a consequent basis of Federal Court Jurisdiction under 28 U. S. C. A., Sec. 1337, the Court develops and underlines and emphasizes the pertinency to such *common law actions* of numerous questions involving Federal statutory law, policy, practice and procedure, and compels the conclusion that Federal Court jurisdiction attaches thus by virtue of 28 U. S. C. A., Sec. 1331, independent of the existence of diversity of citizenship.

One further question raised by this suggestion of the Court below presents itself as an independent and almost equally important question for resolution, namely, the question of whether or not such a reference to the National Labor Relations Board can properly be required or had in any event. It is apparent that the framers of the Labor Management Relations Act considered the federal courts fully competent to adjudicate, within the ambit of their own jurisdiction, any and all questions pertinent to actions for damages under the Act, particularly and specifically including actions for damages caused as a consequence of unfair labor practices. Labor Management Relations Act, Section 303 (Labor Mgmt. Relations Act of 1947, as amended by Public Law 86-257, 1959; 29 U. S. C. §187).

In addition to the important questions tendered by the decision below and the anomalies which it creates,

we further urge that this same opinion requires the Trial Court and the parties to embark upon a voyage in unchartered waters with virtually no aids to navigation.

It is incumbent upon the Trial Court to determine "what effect . . . [the Motor Carrier Act] . . . or any other Federal statute may have upon the surviving common law cause of action . . ." (Op. p. 2.)

It must also determine ". . . to what extent, if any, the common law right has been affected or qualified or supplemented by the Motor Carrier Act . . . or the Labor Management Relations Act, . . . either, neither or both." (Op. p. 3).

The Court must further determine whether the facts make reference to the Commission or the Board appropriate and, must also, presumably, determine whether or not a reference to either of these bodies is authorized or appropriate in any event. (Op. p. 3).

Lastly, the District Court and the parties are enjoined to balance the common law rights of the parties in the light of pertinent Federal statutes, which appear to be conflicting with the common law rights of the parties. (Op. p. 4.) (This in itself points up the major anomaly in the court's decision, as we have argued above, since it constitutes a statement of the court's belief that an inconsistency does exist between the common law and the statutory duty which, by definition of the savings clause cannot occur in the premises!)

The court concedes that "resolution may not be easy", certainly a masterpiece of understatement, particularly in view of the utter absence of any guide lines to follow in resolving these conflicts, striking these balances or

ascertaining precisely what assistance might or could properly be requested of either the Commission or the Board.

If indeed, the trial of the within causes must entail these various determinations, criteria are essential and can be authoritatively supplied only by this court.

Conclusion.

From what we have said, we believe it is evident that the importance of the questions involved in this cause, as well as the uncertainty and confusion presently existing, compel the granting of the within Petition and the issuance of the Writ, as prayed.

Respectfully submitted,

HILL, FARRER & BURRILL,
By CARL M. GOULD,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

302 F. 2d 391 (1962)

United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., Appellant, vs. California Motor Express, et al., Appellees. No. 17,235.

Pensick & Gordon, Inc., a California corporation, Appellant, vs. California Motor Express, Limited, a corporation, et al., Appellees. No. 17,380.

April 13, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; and Pence, District Judge.

Pence, District Judge:

This is an action for money damages brought by shipper against several motor common carrier defendants. The shipper (Appellant), in its original complaint (App. No. 17235) alleged the breach by each of the common carriers (Appellees) of their statutory duty to serve the appellant under the Motor Carrier Act (hereinafter referred to as "MCA."), part II of the Interstate Commerce Act, Section 216 (b) and (d), (49 U.S.C.A., Sections 316 (b) and (d)).[1] The breach

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[1]Section 216 of the MCA (49 U.S.C.A. §316) reads, in pertinent part, as follows:

"(b). It shall be the duty of every common carrier of property by motor vehicle to provide . . . adequate service, to establish . . . just and reasonable . . . practices relating . . . to the manner and method of delivering property for transportation . . .", and "(d). It shall be unlawful for any common carrier by motor vehicle . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage."

alleged was failure of the appellees to pick up and make delivery of goods at appellant's place of business, upon reasonabe terms and without unjust discrimination.

In the original complaint, appellant asserted jurisdiction as to all appellees under 28 U.S.C.A. 1337, on the theory that the MCA gave a shipper the right under the Commerce clause to bring an action for damages in the United States District Court for breach by motor common carriers of their statutory duty to serve shippers and to serve without discrimination. The District Court, relying on Consolidated Freightways v. United Trucklines, (9 Cir., 1954), 216 F2d 543, decided that it did not have jurisdiction to hear and determine the controversy because the MCA does not provide any private remedy for a violation of any of its provisions, from which decision the appeal in No. 17235 was taken.

Appellant filed an amended complaint, again asserting jurisdiction lay in the District Court as to all appellees by virtue of the same 28 U.S.C.A. 1337, and also asserted jurisdiction on the premise that there exists a common law right of court action to enforce the common law duty of common carriers to serve without discrimination, apart from the statute, which common law rights survived the passage of the MCA, and that since diversity existed as to some of the appellees, jurisdiction lay in the District Court by virtue of 28 U.S.C.A. 1332.

Answers, as well as affidavits filed by all parties clearly showed that the failure to serve and the discrimination complained against resulted from the refusal of appellees' unionized drivers to cross a picket line thrown up around appellant's place of business by appellant's employees as a result of a strike at appel-

lant's plant. In determining the existence or nonexistence of the requisite jurisdictional facts, the District Court properly inquired into and weighed all answers and affidavits. *Williams v. Minnesota Mining and Manufacturing Company*, 14 FRD 1, 4-8, SDCal. 1953, and *Ramirez and Feraud Chili Company v. Las Palmas Food Company*, 146 F.Supp. 594, AFFD, 245 F2d 874 (9 Cir. 1957), Cert. Den. 355 US 927, 1958.

From a ruling by the District Court that still it was without jurisdiction to try appellant's amended complaint, a second appeal, No. 17380, was taken. Both appeals, No. 17235 and No. 17380, were joined for the purpose of argument and disposition.

Appellant's basic contentions are that it, as a shipper, has invoked the common law duty of a common carrier to serve; that the shipper's historic right of action for breach of that duty is in no way inconsistent with any power exclusively conferred upon the Interstate Commerce Commission under the MCA; and that the shipper's cause of action continues in dual form both as a common law right under the savings clause of the Act, 216 (j), (49 U.S.C.A. 316 (j)) as well as the statutory sanctions of Section 216 (b) and (d).

Since the facts as shown by the complaints, answers and affidavits clearly demonstrate that the alleged breach of duty of service arose out of the failure of the defendants to serve because of appellant's own labor dispute and appellees' employees' refusal to cross the appellant's union's picket line at appellant's plant, the alleged breach, by the very nature of those facts, depends upon the element of reasonableness or unreasonableness of the acts of appellees' employees in so refusing to cross the picket line. This, per se, demands the factual

determination as to whether or not the carrier failed to provide reasonable service without unjust discrimination as delineated in part II of the MCA, Sections 216 (b) and (d). The question of jurisdiction is thereby brought squarely within the purview of *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904, and *Consolidated Freightways v. United Truck Lines, supra*, and the rationale of those cases is directly applicable here.

The legislative history of the MCA is fully covered in *T.I.M.E., supra*, and *Consolidated Freightways v. United Truck Lines*, 216 Ore. 515, 330 P. 2d 522, cert. den. 355 U. S. 1001. It is clear from that history that the MCA undertook to set forth a comprehensive and all-inclusive scheme for the Federal regulation of common motor carriers. As heretofore indicated, Section 216 as it applies to the instant case, provides that carriers may not unreasonably refuse to serve or unjustly discriminate against any shipper. Therefore, in every case in which the problem of carrier compliance with the service or discrimination clauses of Section 216 of the MCA is raised, there must be a determination by the Commission of whether there has been a disservice or discrimination with respect to treatment of shippers, and whether such treatment was unreasonable or unjustly discriminatory. "Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the National Transportation Policy." *Carpenters' Union v. Labor Board*, 357 U. S. 93, 110, and only the Commission can answer that question.

Under the statutory scheme of the MCA, only the ICC can decide in the first instance whether any alleged act of disservice on the part of the appellees was unreasonable or unjustly discriminatory and the courts are without authority to make such a determination. If, under the saving clause, §216 (j) of the MCA, no common law remedy is saved to a shipper, aggrieved by an unreasonable rate, which was held in T.I.M.E. to be an administrative question, no such remedy is saved to a shipper aggrieved by unreasonable disservice or unjust discrimination, which also is an administrative question, as held in *Carpenters' Union v. Labor Board, supra*. Whenever, under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice or unjustness of such discrimination, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the courts.

It is not necessary for us to decide, and we do not so decide, that no common law actions have survived the MCA, but where, as appellant recognized here,[2]

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[2] "The gist of the action is the failure of the Defendants individually, at specified times, to provide service to the Plaintiff upon reasonable terms and without discrimination."
App. No. 17235, Apnt. Op. Br., p. 1.

"This cause is the companion to that in Ap. No. 17235 . . . The theories of the first and second causes are identical."
Ap. No. 17380, Apnt. Op. Br., p. 1, 2.

"Sec. 216(b) and (d) of the Motor Carrier Act . . . contains . . . a statutory embodiment of this . . . (common law duty of a common carrier to serve).

"The commission has further refined the general standards laid down by the statute . . .

"The foregoing are the standards by which the conduct of the Appellees must be measured, and this Appellant does not question the standards; it seeks only to establish a failure to conform to them . . ."
Aps. No. 17235, No. 17380, Apnt. Reply Br., p. 3.

the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it.

Having decided these appeals on the above grounds, we do not find it necessary to pass upon the merits of appellees' affirmative defense that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board.

As to each appeal, we hold the District Court correctly dismissed each complaint for lack of jurisdiction.

Affirmed.

(Endorsed) Opinion Filed April 13, 1962.

Frank H. Schmid, Clerk.

APPENDIX B.

Supreme Court of the United States.

No. 222. Pensick & Gordon, Inc., Petitioner, v. California Motor Express et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

December 3, 1962. Per Curiam: The Petition for Writ of Certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., No. 37, October Term, 1962, decided November 19, 1962.

Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice White would affirm the judgment below for the reasons given in the dissenting opinion in No. 37.

APPENDIX C.

Opinion of the Supreme Court of the United States.

Supreme Court of the United States.

No. 37.—October Term, 1962.

Hewitt-Robins, Incorporated, Petitioner, v. Eastern Freight-Ways, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[Noyember 19, 1962.]

Mr. Justice Clark delivered the opinion of the Court.

This is an action by a shipper to recover from a motor carrier the difference in rate charges resulting from a practice of the latter of carrying unrouted intrastate shipments on its interstate routes at higher rates than those applicable to its available intrastate routes. The District Court for the Southern District of New York stayed the action awaiting a finding by the Interstate Commerce Commission as to the reasonableness of the practice. The Commission found it unreasonable* under the Motor Carrier Act, 49 U. S. C.

*302 I. C. C. 173. Respondent brought an action against the United States and the Commission in the District Court for the District of New Jersey, seeking to set aside the report and cease-and-desist order entered by the Commission. After the complaint was filed the Commission amended its disposition by striking out the cease-and-desist order, leaving only its declaratory findings as to past practices. The three-judge court, relying upon our decision in *United States v. Interstate Commerce Commission*, 337 U. S. 426 (1949), held that as a three-judge court it had no authority to adjudicate the controversy since no order was under attack. 170 F. Supp. 848. Decision in the action is now held in abeyance by a single judge pending disposition of this litigation. Thus the litigation has been bifurcated into two District Courts, whose further proceedings may yet be separately appealable. This might have been avoided had the District Court for the Southern District of New York followed this Court's

§§ 301-327, and subsequently the District Court dismissed the complaint on the ground that the Act neither provided any reparation remedy nor preserved one at common law. 187 F. Supp. 722. The Court of Appeals, one judge dissenting, affirmed on the same grounds. 293 F. 2d 205. Each court bottomed its decision upon *T. I. M. E., Inc., v. United States,* 359 U. S. 464 (1959). Having some doubts as to the appositeness of that case and because of the importance of the question in the administration of the Act, we granted certiorari. 368 U. S. 951. We have concluded that *T. I. M. E., Inc., supra,* does not control the issue here and therefore reverse the judgments.

The petitioner alleges that between January 1, 1953, and February 1, 1955, it delivered numerous shipments of foam rubber pads to respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City. It claims that while the shipments were tendered without specifying the routes of shipment the respondent, contrary to its duty as a common carrier, shipped the pads over its interstate route at the higher tariff that it had on file with the Interstate Commerce Commission rather than over its intrastate route at the lower tariff that it had on file with the Public Service Commission of New York. Excess charges in the sum of $10,000 have been collected by respondent for which petitioner prays judgment.

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admonition that "the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshalling them into a meaningful pattern." *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481, 498 (1958), rather than relying upon the shipper to file an adversary proceeding with the Commission.

The sole issue before us is whether the complaint states a cause of action upon which the District Court may grant relief. The gist of the action as alleged is that the shipper had the common-law right and the carrier owed it the duty to ship the pads over the cheapest available route, no adequate justification for not so doing being shown. Nevertheless, petitioner says, the carrier in derogation of this responsibility transported the pads at the higher rate and subjected the shipper to the $10,000 damage.

No attack is made upon either of the carrier's published tariffs—both are admittedly reasonable. The controversy hinges entirely upon whether the carrier violated its duty to the shipper in selecting the interstate route and the accompanying higher rate which subjected the shipper to the loss, *i.e.*, the difference between the two lawful rates. We believe that the complaint stated a justiciable cause of action. The issue here is a far cry from that in *T. I. M. E., Inc. v. United States, supra.* There the question, as stated by the Court, was, "Can a shipper of goods by a certificated motor carrier challenge in postshipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" 359 U. S. 464, 465. The Court determined that such an attack was foreclosed by the "savings clause" of the Act, § 216 (j), 49 U. S. C. § 316 (j), as being inconsistent with the statutory scheme of regulation. We emphasized the built in protections given shippers against unreasonable rates, at pp. 478-480, citing the 30-day notice provision of the Act, § 216 (g), as well as the power granted the Commission under § 217 (c) to suspend rates for seven months. The

Court concluded that those remedies amply protected the shipper and that the allowance of a judicial remedy would result in undercutting the stability of the rate structure which the statutory procedures sought to insure.

Here the challenge is directed not at the "reasonableness" of the rates but at the carrier's misrouting practice. The question, therefore, is not one of rates but of routes. The determination of rail carriers' routing practices has long been within the primary jurisdiction of the Commission. *Northern Pacific R. Co. v. Solum*, 247 U. S. 477 (1918). This jurisdiction is the more important in the case of motor carrier routing where alternative routes are greater in both number and variety. Furthermore, selection of the route is usually made on an *ad hoc* basis, precluding preshipment determination of its reasonableness. Unlike rate making there is no statutory procedure by which routing practices may be challenged in advance of shipment. Nor is the shipper by truck accorded even the right given the shipper by rail, under 49 U. S. C. § 15 (8), to select and request a particular route of the carrier. In view of these weighty statutory differences between ratemaking and routing practices the survival of a damage claim for misrouting appears entirely consistent with the Act. It, therefore, meets the *proviso* of the "saving clause" as well as the teaching of *T. I. M. E., Inc.*

This conclusion is buttressed by the fact that the allowance here of a damage action in nowise hampers the efficient administration of the Act, unlike the allowance of such an action as to unreasonable rates. A misrouting claim does not jeopardize the stability of

tariffs or of certificated routes, the sole issue being whether the carrier routed the shipment over the cheapest available route, or made a showing of adequate justification for not doing so. Moreover, the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize "cease and desist" proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act. The allowance of such actions would, on the contrary, give neither an unfair advantage.

Those who contend that no judicial remedy is available place much weight on the fact that, as we have said, the Interstate Commerce Commission has primary jurisdiction in routing practices. We put no significance in whether one tags the claim as "overcharges" as Commissioner Eastman apparently did in his testimony before the Senate, see *T. I. M. E., Inc., supra*, at 477-478, n. 18, or whether it is a proceeding involving the "reasonableness" of routing practices. In either case the problem is one originally within the jurisdiction of the Commission. To say, however, that such primary jurisdiction compels the conclusion that the courts are without power to award damages in every instance where the Commission may not award reparations by no means follows. Indeed, the doctrine of primary jurisdiction is designed to apply "where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues . . . placed within the special competence of an administrative body . . ." *United States v. Western Pacific R. Co.*, 352

U. S. 59, 64 (1956); see Davis, Administrative Law Treatise, § 19.01 (1958). The practice of the Commission in making such determination in the first instance, even though it has no power to award reparations in a given case, has long been exercised, *Bell Potato Chip Co. v. Aberdeen Truck Line,* 43 M. C. C. 337, 343 (1944), and is supported by a long line of cases. See *Thompson v. Texas Mexican R. Co.,* 328 U. S. 134 (1946), and cases there cited. Be this as it may, the survival of a judicial remedy under the savings clause of § 216 (j) cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. According to § 216 (j), if the remedy is inconsistent with that scheme it does not survive. In *T. I. M. E., Inc.,* we found inconsistencies and hence no judicial remedy survived. Here, as we have indicated, rather than running interference against the Act the exercise of the judicial remedy supports its overall purposes and is in nowise inconsistent with the congressional scheme embodied within its four corners. The remedy, therefore, survives and the judgment is

Reversed.

Supreme Court of the United States.

No. 37.—October Term, 1962.

Hewitt-Robins, Incorporated, Petitioner, v. Eastern Freight-Ways, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 19, 1962.]

Mr. Justice Harlan, whom Mr. Justice Stewart and Mr. Justice White join, dissenting.

With deference, I consider that the *T. I. M. E.* case, 359 U. S. 464, plainly controls this one. That it does control is not and could hardly be gainsaid to the extent that the complaint purports to allege a statutory cause of action, that is, one based on the terms of the Motor Carrier Act itself. *T. I. M. E.*, at 468-472. However, construing the complaint as alleging also a common-law cause of action, the Court holds that such an action is "not inconsistent" with the Motor Carrier Act and is therefore preserved by § 216 (j) of the statute.

The Court's decision rests primarily on the significance it accords to the existence of certain administrative procedures available to shippers to challenge *rates* in advance of their application, see §§ 216 (g) and 217 (c) of the Act, and the lack of such protective remedies in the case of *routing* practices. In addition, three further considerations are asserted to support its conclusion: (1) a misrouting claim does not jeopardize the stability of tariffs or of certificated routes, whereas to permit actions attacking the reasonableness of rates would hamper the efficient administration of the

Act; (2) the allowance of misrouting actions will deter misrouting practices and decrease the number of "cease and desist" proceedings before the I. C. C.; (3) the absence of any judicial remedy would put the shipper entirely at the mercy of the carrier, contrary to the purpose of the Motor Carrier Act. This reasoning, I submit, entirely misconceives the basis of the *T. I. M. E.* decision.

The result reached in *T. I. M. E.* basically rested on two interdependent considerations: (1) the courts may not adjudicate a matter over which the Commission has been given primary jurisdiction, 350 U. S., at 473-474; (2) since the Commission must decide whether a rate is reasonable and Congress has denied it the authority to award reparations for past unreasonable charges, to allow a judicial remedy for recovery of past rate charges would "permit the I. C. C. to accomplish indirectly what Congress has not chosen to give it authority to accomplish directly," *id.*, at 475.

Both of these factors are present here. There can be no doubt that under § 216 (b) and (c) of the Interstate Commerce Act the Commission has primary jurisdition over the complained of misrouting practices,[1] as indeed the Commission's action taken with respect to these very practices, *Hewitt-Robins, Inc., v. Eastern Freight-Ways, Inc.*, 302 I. C. C. 173, and the Court's

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[1]Section 216(b) of the Interstate Commerce Act, 49 U. S. C. § 316(b), provides in pertinent part: "It shall be the duty of every common carrier of property by motor vehicle . . . to . . . observe . . . reasonable . . . practices . . . relating to or connected with the transportation of property in interstate . . . commerce." Section 216(c) provides that whenever "the Commission shall be of the opinion that any . . . practice . . . is or will be unjust and unreasonable . . . it shall determine . . . the lawful . . . practice."

opinion in this case show. Nor is it suggested that the Commission possesses any reparations authority with respect to such misrouting. The conjunction of these factors thus brings *T. I. M. E.*, decided only four Terms ago, into full play.

1. It is true that in this instance the Act does not contain certain protective provisions as in the case of rate-making. This cannot, however, serve to distinguish *T. I. M. E.*, whose determination of the congressional purpose underlying the Motor Carrier Act was based on considerations that stand quite independently of the impact of particular provisions of the statute. It should also be noted that the absence of such provisions does not mean that carriers may follow misrouting practices with impunity. Section 212 (a) of the Act provides that the Commission may, on its own initiative or on complaint, suspend or revoke certificates, permits, or licenses for willful failure to comply with any provision of the Act or any order or regulation of the Commission. Under § 216 (a) the Commission may order the termination of an unjust practice and prescribe the lawful practice to be followed. Section 222 (a) imposes fines for violations of the Act, and § 222 (b) confers jurisdiction on the District Courts to enjoin violations of the Act when application is made by the Commission.

2. If the issue as to the reasonableness of a routing practice is referred to the Commission, a procedure the Court recognizes as essential, allowance of a judicial remedy for misrouting will not jeopardize the stability of tariffs or of certificated routes. But the suggestion that such a danger was presented by a court action challenging unreasonable rates and that this contributed

to the decision in *T. I. M. E.* is manifestly untenable. It was conceded there, as of course it had to be under prior decisions of this Court,[2] that the primary jurisdiction doctrine compelled referral to the Commission of all issues as to the reasonableness of the rates. Since even if a judicial remedy were allowed the Commission would have been the tribunal deciding the basic question, the course of decision would have been uniform and there would not have been, any more than here, interference with the Commission's functioning in the area of its special competence or any threat to the stability of the rate structure. Moreover, the possibility that rate actions might constitute a threat to the rate structure through stimulating excessive litigation could hardly have been regarded as a significant factor in *T. I. M. E.*, for it was there observed that only a handful of actions to recover for unreasonable charges had been brought in the previous 24 years. 359 U. S., at 479. And if the Court now believes that to have been a relevant consideration in *T. I. M. E.*, it should certainly be of greater weight with respect to misrouting claims, which are likely to arise more frequently because, as the Court points out, "selection of the route is usually made on an *ad hoc* basis, precluding preshipment determination of its reasonableness."[3]

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[2]See, *e.g.*, *Texas & Pacific R. Co. v. American Tie & Timber Co.*, 234 U. S. 138; *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

[3]If the Court's reference to Commissioner Eastman's statement quoted in *T. I. M. E.*, at 477-478, n. 18, is intended to imply that the present action may be characterized as one for rate "overcharges" and thus is permissible, it should be noted that the "overcharges" to which the Commissioner referred were, as his statements makes clear, charges "above published tariff rates," *id.*, at 478, not those resulting, as alleged here, from the application of a wrong tariff. It is only the former that the Commisioner thought could be recovered "in court as the law now stands." *Id.*, at 478.

3: Finally, as to the suggestions that actions such as this should be allowed because of their incidental deterrent effect on misrouting practices and in the interest of justice to shippers, it need only be said that these are matters for the Congress.[4] Our duty is to apply the statute as we find it.

I would affirm.

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[4]So far, Congress has refused to act. See H. R. 8031, 86th Cong., 1st Sess. (1959); 359 U. S., at 471-472 and notes 10, 11.

APPENDIX D.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., Appellant, vs. California Motor Express, et al., Appellees. Nos. 17,235 and 17,-380 Sept. 18, 1963.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges and Weigel, District Judge.

Weigel, District Judge.

When these cases were considered by us last year,[1] we held that the District Court was without jurisdiction to determine whether or not appellee motor carriers failed to provide service as required by Section 216 of the Motor Carrier Act (49 U.S.C.A. §316). We affirmed dismissal of a complaint grounded in claims of violation of that statute because of our view that the statute itself vested such jurisdiction exclusively in the Interstate Commerce Commission. We held, further, that the effort of appellant, in an amended complaint, to assert a common law right of action for failure to provide service raised identical issues and was, therefore, also rightly dismissed by the District Court upon the same grounds.

The Supreme Court has now remanded to us "for further consideration in light of *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, [371 U.S. 84 (1962)]". 371 U.S. 184 (1962).

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[1] 302 F.2d 391 (1962).

In the light of *Hewitt-Robins*, we now hold that the amended complaint states a common law cause of action which survived enactment of the Motor Carrier Act. What effect that statute or any other federal statute may have upon the surviving common law cause of action will have to be determined by the District Court in further proceedings.

We do not read *Hewitt-Robins* as holding that the Motor Carrier Act created a statutory cause of action cognizable in the federal courts in the first instance. *Hewitt-Robins* considered only the survival of the common law right there involved. It did not change the holdings in *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959) nor *Consolidated Freightways v. United Truck Lines*, 216 F.2d 543 (9th Cir., 1954) upon which we relied in deciding that the first complaint, grounded in claimed violations of statutory right, was properly dismissed for lack of jurisdiction.

Therefore, the further proceedings below, grounded solely in common-law rights, will be limited to the plaintiff and to those defendants as to whom diversity exists.

The starting point for further proceedings on the cause of action sounding in common law will rest, of course, upon the long recognized doctrine that a cause of action does exist against a common carrier for unjustified failure or refusal to transport freight. The California cases include: *Samuelson v. Public Utilities Commission*, 36 C.2d 722, 227 P.2d 256 (1951); *Chase v. South Pacific Coast R. Co.*, 83 Cal. 468, 23 Pac. 532 (1890); *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616 (1868) (passenger); *American Fruit Distributors v. Hines*, 55 C.A. 377, 203 Pac. 921 (1921). The

cases in other jurisdictions include: *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612 (1909); *York Co. v. Central R.*, 70 U.S. (3 Wall.) 107 (1865); *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. (6 How.) 343 (1848); *Swayne & Hoyt, Inc. v. Everett*, 255 Fed. 71 (9th Cir., 1919); *Moor v. Texas & N. O. R. Co.*, 75 F.2d 386 (5th Cir., 1935); *Merchandise Warehouse Co. v. A.B.C. Freight For. Corp.*, 165 F.Supp. 67 (S.D. Ind., 1958); *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F.Supp. 475 (D. Ore., 1953); *Louisville & N.R. Co. v. Falls City etc. Co.*, 61 S.W. 2d 639 (Ct. Ap. Ky., 1933); *Nelson v. Atlantic Coast Line R. Co.*, 82 S.E. 868 (S.Ct. N.C., 1914); *Pittsburgh etc. R. Co. v. Racer*, 31 N.E. 853 (Ap. Ct. Ind., 1892); *Avinger v. South Carolina R. Co.*, 7 S.E. 493 (S.Ct. S.C., 1888); *Central & M.R. Co. v. Morris*, 3 S.W. 457 (S. Ct. Tex., 1887).

Appellees again strongly urge upon us that the jurisdiction of the District Court was pre-empted by that of the National Labor Relations Board under the Labor Management Relations Act 29 U.S.C.A. §§141 *et seq.* In support of this position, they rely upon these cases: *General Drivers Union v. American Tobacco Co.*, 264 S.W.2d 250 (Ct. Ap. Ky., 1953, modified on rehearing 1954), reversed, 348 U.S. 978 (1955); *Kerrigan Iron Works v. Cook Truck Lines*, 296 S.W.2d 379 (Ct. Ap. Tenn., 1956), reversed sub nom. *Teamsters Local No. 327 v. Kerrigan Iron Works*, 353 U.S. 968 (1957); *Aladdin Industries v. Associated Transport*, 298 S.W. 2d 770 (Ct. Ap. Tenn., 1956), vacated and remanded sub nom. *McCrary v. Aladdin Radio Industries*, 355 U.S. 8 (1957), see 323 S.W.2d 222 (Ct. Ap. Tenn., 1958) on remand; *Jakes Foundry Co. v. Tennessee-*

Carolina Trans. Co., 329 S.W.2d 364 (Ct. Ap. Tenn., 1959), reversed sub nom. *Bogle v. Jakes Foundry Co.*; 362 U.S. 401 (1960). The cited cases are not controlling here. This is an action by a shipper against various common carriers for damages resulting from claimed breach of a common law duty. No union is a party. No union intervened. No unfair labor practice is alleged. No injunction was issued or sought to control the conduct of any union or employer. The absence of any such facts here sufficiently distinguishes the cases relied upon by appellees.

In further proceedings, the District Court can determine to what extent, if any, the common law right has been affected or qualified or supplemented by the Motor Carrier Act, *supra*, or the Labor Management Relations Act, *supra*.—either, neither or both. Moreover, if development of the facts should make it appropriate, the District Court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to that court's ultimate decision. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958); *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956). See also *Hewitt-Robins, supra*, p. 85, footnote.

The evidence adduced before the District Court may well disclose a situation where the common law rights of the parties must be balanced in the light of pertinent federal statutes. Indeed, a balance may have to be stricken in measuring the conflicting impacts of apparently conflicting federal statutes upon those common law rights. Resolution may not be easy, but it can

best be accomplished after a full airing and consideration of all the facts.

The matter is now accordingly remanded to the District Court for further proceedings consistent with the views expressed above.

(Endorsed). Opinion Filed September 18, 1963.

Frank H. Schmid, Clerk.